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Supreme Court, U.S.
FILED
APR 24 2001
CLERK

No. 00-1342

IN THE

Supreme Court of the United States

RACAL SURVEY, U.S.A., INC., NCS INTERNATIONAL, INC.,

Petitioners,

v.

M/V COUNT FLEET, her engines, tackle, furniture & appurtenances, *in rem*, *et al.*,

TIDEWATER MARINE INTERNATIONAL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT, TIDEWATER MARINE INTERNATIONAL, INC.

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QUESTION PRESENTED

Whether the Fifth Circuit was correct in concluding that petitioner had no *in rem* maritime lien against respondent's vessels under the Maritime Lien Act, 46 U.S.C. § 31341, *et seq.*, when the evidence showed that:

1. Petitioner did not rely on the credit of the vessels when providing goods and services to the charterer of the vessels; and

2. Petitioner did not provide the goods and services to the vessels within the meaning of the Maritime Lien Act because the vessels' charterer had complete discretion as to choice of vessels, placement of equipment, and assignment of personnel.

LIST OF ALL PARTIES AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rules 15, 24(1)(b), and 29.6, the following entities were parties to the proceeding in the court for whose judgment review is sought:

1. Racal Survey U.S.A., Inc.;

2. NCS International, Inc.;

3. Tidewater Marine International, Inc.; and

4. Input/Output, Inc.

Tidewater Marine International, Inc. is a wholly-owned subsidiary of Tidewater Inc., which is a publicly-held corporation, the stock of which is traded on the New York Stock Exchange.

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Tidewater Marine International, Inc. ("TMI") opposes the petition for a writ of certiorari of Racal Survey, U.S.A., Inc. and NCS International, Inc. (collectively "Racal").[1]

CITATIONS OF REPORTS OF OPINIONS BELOW

The Fifth Circuit's opinion in *Racal Survey U.S.A., Inc. v. M/V Count Fleet, et al.*, No. 98-31382, 98-31383 is reported at 231 F.3d 183. It is attached to petitioner's brief as Appendix A, pp. 1a-17a.

The district court judgment attached as petitioner's Appendix D, pp. 42a-44a, does not pertain to petitioner's claim, but is instead the ruling granting intervenor, Input/Output, Inc., all of the Coastline equipment on the TMI vessels pursuant to a UCC lien. The district court's judgment on petitioner's claim is located on the final pages of the district court's ruling and amended ruling, both of which are unreported and are attached as petitioner's Appendix B, pp. 18a-29a and Appendix C, pp. 30a-41a.

STATEMENT OF JURISDICTION

This case is within the district court's admiralty jurisdiction pursuant to 28 U.S.C. § 1333. The Fifth Circuit had appellate jurisdiction under 28 U.S.C. § 1292(a)(3) because the district court's grant of summary judgment determined the rights and liabilities of Racal and TMI. Interlocutory determinations of maritime liens and interlocutory decrees which determine the liability of at least one party to a maritime case are appealable, even when damages have not been finally determined. *Associated Metals & Minerals Corp. v. Alexanders Unity MV*, 41 F.3d 1007 (5th Cir. 1995); *Stoot v. Fluor Drilling Services, Inc.*, 851 F.2d 1514 (5th Cir. 1988).

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1. Racal is referred to as "petitioner" throughout since the two companies have now merged.

The judgment of the court of appeals was entered on October 24, 2000, and petitioner's petition for rehearing *en banc* was denied on November 20, 2000. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTES

In addition to those constitutional and statutory provisions listed by the petitioner, the following statutes are also involved in this matter:

1. The Federal Maritime Lien Act of June 23, 1910, ch. 373, 36 Stat. 604 (1910)(repealed) is relevant to the historical development of the Maritime Lien Act, 46 U.S.C. § 31341, *et seq.*:

> An Act Relating to liens on vessels for repairs, supplies, or other necessaries. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any person furnishing repairs, supplies, or other necessaries, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic upon the order of the owner or owners of such vessel, or of a person by him or them authorized, shall have a maritime lien on the vessel which may be enforced by a proceeding in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.
>
> * * *
>
> SEC. 4 That nothing in this Act shall be construed to prevent a furnisher of repairs, supplies, or other necessaries from waiving his right to a lien at any time, by agreement or otherwise, and this Act shall

not be construed to affect the rules of law now existing, either in regard to the right to proceed against a vessel for advances, or in regard to laches in the enforcement of liens on vessels, or in regard to the priority or rank of liens, or in regard to the right to proceed in personam.

SEC. 5 That this Act shall supersede the provisions of all state statutes conferring liens on vessels in so far as the same purport to create rights of action to be enforced by proceedings in rem against vessels for repairs, supplies, and other necessaries.

2. Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims is the procedural vehicle by which a maritime lien is asserted and by which the claimant to the vessel answers the petition and claims the vessel.

Rule C. Actions in Rem: Special Provisions

(1) **When Available.** An action in rem may be brought:

(a) To enforce any maritime lien;

* * *

(6) **Claim and Answer; Interrogatories.** The claimant of property that is the subject of an action in rem shall file a claim within 10 days after process has been executed, or within such additional time as may be allowed by the court. . . .

3. Rule 10 of the Rules of the Supreme Court of the United States provides considerations governing review on certiorari:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

STATEMENT OF THE CASE

The United States Fifth Circuit Court of Appeals concluded that Racal did not have an *in rem* lien under the Maritime Lien Act, 46 U.S.C. § 31341, *et seq.*, ("MLA") against vessels owned by TMI because the evidence demonstrated that (1) Racal did not rely on the credit of the vessels when it provided goods and services to the vessels' charterer and (2) Racal did not provide the goods and services to the vessels themselves, but instead provided them to the charterer. *Racal Survey U.S.A., Inc. v. M/V Count Fleet,* 231 F.3d 183, 190, 192 (5th Cir. 2000); Petitioner's Appendix A, pp. 12a, 16a. Racal now seeks a writ of certiorari arguing that the Fifth Circuit ignored the law and that there is a conflict in the circuits. Racal is wrong on both counts. The facts, as set forth below, prove that Racal does not have a lien under the Maritime Lien Act as that Act has been consistently interpreted by this Court as well as the circuit courts.

This action arose when Racal filed an *in rem* claim and arrested TMI's vessels seeking to hold the vessels responsible for the debts of Racal's customer, Coastline Geophysical, Inc.[2] Coastline is an insolvent seismic company that obtained seismic equipment and services from Racal. Coastline was a new company that performed offshore surveys to obtain seismic data which was provided to its clients for use in oil and gas exploration. (R.E. 10).[3] Coastline purchased and leased equipment from Racal and contracted with Racal for personnel to install, operate, and maintain the equipment.

2. TMI as owner *pro hac vice* of the vessels, M/V COUNT FLEET, M/V COUNT TURF, M/V SECRETARIAT, and their engines, tackle, furniture, and appurtenances, is claimant to these vessels in this *in rem* action.

3. TMI's record excerpts in the appellate court are cited as "R.E.," while the record is cited as "Rec. Vol."

(R.E. 8, pp. 45-47). Coastline's operations were modularized, such that the seismic equipment was housed in containers that could be easily moved from vessel to vessel to satisfy the world-wide needs of its customers as cheaply as possible. (R.E. 10; R.E. 9, pp. 38-39, 42-43, 84; Rec. Vol. 9, p. 1357).

The Racal/Coastline agreements did not involve TMI or its vessels. At the time Racal agreed to provide goods and services to Coastline, Coastline had not decided what vessels it would use or from which company it would charter the vessels. (R.E. 8, pp. 45-47). Consequently, as confirmed by Richard Pender, the president of Racal who negotiated Racal's contract with Coastline, Racal did not know or care what vessels would be used by Coastline when Racal contracted with Coastline because Coastline had not yet chartered any vessels. (R.E. 8, pp. 45-47). Racal never specified what vessels Coastline could or should use, and Coastline could and did switch vessels during its operations. (R.E. 8, pp. 45-47). Throughout the venture, Coastline retained complete discretion over the vessels that would be used. (R.E. 8, pp. 45-47). Both Racal's Vice President of Operations and Racal's surveyor admitted that Racal installed and transferred the equipment aboard vessels as directed by Coastline and that Racal would have installed the equipment on any vessel chosen by Coastline. (Rec. Vol. 9, p. 1357; exhibit E, pp. 35-36; exhibit H, p. 44; R.E. 8, pp. 45-47). The equipment and personnel were not earmarked by Racal for specific vessels. (Rec. Vol. 1, pp. 55, 57, 60, 63-65, 68-71, 74-75, 80-82, 84). The Racal personnel also worked when and where Coastline directed, and Coastline had authority to substitute Racal personnel aboard different vessels as it saw fit. (Rec. Vol. 9, p. 1357, exhibit H, pp. 65-66, 133). As Racal's surveyor explained, "We were constantly jumping from boat to boat." (Rec. Vol. 9, p. 1357, exhibit H, p. 147).

Racal's president, Pender, also confirmed that Racal did not rely on the credit of the vessels when Racal agreed to provide goods and services to Coastline. Pender testified:

> Q: So you weren't relying on [the] credit of Tidewater or any of its vessels when you were entering into this contract with Coastline?
>
> * * *
>
> A: Yeah, I mean, our contract was with Coastline. That was our customer.
>
> * * *
>
> Q: At the time of contracting with Coastline, you weren't looking to Tidewater or any of its vessels for payment of Coastline's contract with NCS?
>
> * * *
>
> A: I had no contract with Tidewater.
>
> Q: You had no dealings with Tidewater whatsoever?
>
> A: No. I had no — no.

Racal, 231 F.3d at 189; R.E. 8, pp. 50-51; Petitioner's Appendix A, pp. 9a-10a. The absence of any reliance by Racal on the credit of the vessels is obvious since Coastline had not yet chartered any vessels at the time Racal agreed to provide goods and services to Coastline. (R.E. 8, pp. 45-47). Pender further explained that Racal relied only on Coastline's personal credit, rather than the credit of the

vessels, based on a number of factors including (1) Pender's prior relationship with Coastline's president, Keith Jones, (2) Pender's investigation into Coastline's credit worthiness during contract negotiations, (3) Pender's confirmation that Coastline's funding was from reputable sources, and (4) Pender's evaluation of the proposed operation and Coastline's chance of success, which induced Pender to personally invest $50,000 in the venture. (R.E. 8, pp. 45-47).

After Coastline contracted with Racal for equipment and services, Coastline set out to charter vessels.[4] For its first survey operation in the Gulf of Mexico, Coastline chartered five offshore supply and utility vessels from Tidewater Marine, Inc. n/k/a Tidewater Marine, L.L.C. (Rec. Vol. 8, pp. 1184, 1190-1207). Under the charter, Coastline was expressly prohibited from incurring liens or permitting liens to be imposed on the vessels. *Id.* Coastline was required to pay for all equipment it loaded onto the vessels, and none of the equipment was to be provided on the credit of the vessels. *Id.* The equipment remained the property of Coastline, and Coastline was required to maintain it. *Id.*

Several months after the charter with Tidewater Marine, Coastline obtained a contract to perform a survey off the coast of Africa. To handle that job, Coastline executed a Blanket Time Charter with TMI for vessels qualified to operate overseas, and transferred the seismic equipment from the vessels operated by Tidewater Marine during the first charter to different vessels operated by TMI during the second charter. (R.E. 12; R.E. 10; Rec. Vol. 9, p. 1357; exhibit H, pp. 135-137). Coastline was permitted to install and load seismic equipment on the vessels, but had to pay for and

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4. Contrary to Racal's contention, Racal agreed to provide equipment and personnel to Coastline in February of 1996, prior to Coastline's charter of both the Tidewater Marine and TMI vessels. (R.E. 8, pp. 45-47, 60; Rec. Vol. 8, pp. 1190-1207; R.E. 12).

maintain the equipment. (R.E. 12). Coastline was again prohibited from permitting liens to be imposed on the vessels or from obtaining equipment on the credit of the vessels. *Id.*

Coastline failed to pay TMI more than $2 million in charter hire, and the charter was terminated at the conclusion of the Africa project. (R.E. 11). The TMI vessels then sailed to Trinidad for another job. When the vessels returned to the United States, Racal arrested three of the TMI vessels contending it had a maritime lien pursuant to the MLA.[5] Before the vessels could return to work, TMI was required to provide security for the amounts claimed by Racal. (Rec. Vol. 2, p. 191; R.E. 9, pp. 69-70).

At the district court, TMI filed a motion for summary judgment seeking dismissal of Racal's claims on the basis that Racal does not have a maritime lien over the TMI vessels that were arrested. Racal filed a motion for partial summary judgment seeking a declaration that it had a valid maritime lien against the three TMI vessels. The district court denied TMI's motion, but granted Racal's motion.[6] (Petitioner's Appendixes B and C).

The Fifth Circuit reversed because the undisputed facts reveal that Racal has no maritime lien against TMI's vessels under the MLA. (*Racal*, 231 F.3d at 193; Petitioner's Appendix A, p. 17a). The Fifth Circuit first held that testimony from Racal's president that he did not rely on the credit of the TMI vessels was sufficient as a matter of law to

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5. Tidewater Marine's vessels were not arrested by Racal prior to the district court's ruling and are not part of the ruling from which Racal seeks relief. However, to prevent the arrest of Tidewater Marine's vessels, Tidewater was forced to issue a second Letter of Undertaking to Racal.

6. The district court did not even mention Pender's testimony in its ruling. *See* Petitioner's Appendixes B and C.

prove that Racal did not have a lien under the MLA because it did not rely on the credit of the TMI vessels when providing goods and services to Coastline. 231 F.3d at 190; Petitioner's Appendix A, p. 12a. The Fifth Circuit then held that Racal did not provide goods and services to the vessels because the goods and services were not provided to the TMI vessels but to Coastline, which had complete discretion over which vessels would be used and onto which vessels the equipment and personnel were to be placed. 231 F.3d at 192; Petitioner's Appendix A, p. 16a. Because each of these holdings disposed of the matter, the Fifth Circuit did not address the remaining two defects in Racal's claim for a lien, i.e., the goods and services were not vessel necessaries and were not provided on the order of the owner.[7]

Racal requested rehearing *en banc* in the Fifth Circuit, contending the same things it contends in its petition for a writ of certiorari. Racal's petition for rehearing was denied, and this petition followed.

RACAL'S PETITION SHOULD BE DENIED

Racal's petition for a writ of certiorari should be denied because the Fifth Circuit correctly applied well-settled law to undisputed facts. There is no conflict among the circuits, and the Fifth Circuit interpreted and applied the MLA in accordance with 90 years of jurisprudence interpreting that statute. Contrary to Racal's argument that this Court has not addressed the issue of maritime liens in more than 60 years, both of the issues raised by Racal in its petition have been the subject of writ denials, with this Court denying writs in

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7. Because the Fifth Circuit based its decision on two defects, each of which is independently sufficient to defeat Racal's alleged lien, this Court must deem both issues worthy of review to have any potential effect on the outcome of this case.

the very cases the Fifth Circuit relied on in rendering its opinion below.[8]

Racal's actual quarrel is with the Fifth Circuit's conclusion that the evidence proved Racal had no maritime lien over TMI's vessels. In essence, Racal contends that the appellate court either made erroneous factual findings or misapplied a properly stated rule of law. Under Rule 10 of the Rules of this Court, certiorari is not warranted.

A. Maritime Liens and *In Rem* Liability

To obtain a lien under the MLA, the supplier must prove the following:

1. The goods or services must be provided **on the order of the owner**;

2. The goods or services must be **provided to the vessel**; and

3. The goods or services must be **necessary to the vessel**.

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8. This Court denied writs in *Equilease Corp. v. M/V Sampson*, 793 F.2d 598 (5th Cir. 1986)(*en banc*), where the Fifth Circuit held that reliance on the credit of the vessel was necessary for a maritime lien under the MLA and that the testimony of the supplier that it relied solely on the credit of entities other than the vessel was sufficient to prove that the supplier did not rely on the credit of the vessel. *See Fred S. James & Co. of Texas, Inc. v. Equilease Corp.*, 479 U.S. 984 (1986).

The Court also denied writs in *Foss Launch & Tug Co.*, 808 F.2d 697 (9th Cir. 1987), where the Ninth Circuit held that there is no lien under the MLA if the supplier does not furnish the supplies to a particular vessel. *See Itel Containers Intern. Corp. v. M/V C.C. San Francisco*, 484 U.S. 828 (1987). In this case, the Fifth Circuit relied upon *Silver Star Enterprises, Inc. v. Saramacca MV*, 82 F.3d 666 (5th Cir. 1996), which relied upon *Foss Launch*.

46 U.S.C. § 31342. If the supplier fails to establish any of the above elements, the supplier has no lien and cannot proceed directly against the vessel *in rem*. *Piedmont v. George's Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1, 11 (1920); *Equilease Corp. v. M/V Sampson*, 793 F.2d 598 (5th Cir. 1986)(*en banc*), *cert. denied*, 479 U.S. 984 (1986); *Farwest Steel Corporation v. Barge Sea-Span 241*, 828 F.2d 522, 524-525 (9th Cir. 1987), *cert. denied*, 485 U.S. 1034 (1988). Similarly, if the vessel proves that the supplier did not rely on the credit of the vessel, there is no maritime lien against the vessel. *Piedmont*, 254 U.S. at 9; *Equilease*, 793 F.2d at 605-606; *Farwest*, 828 F.2d at 525; *Navieros Intern-Americanos, S.A. v. M/V Vasilia Express*, 120 F.3d 304, 323 (1st Cir. 1997); *Stevens Technical Services, Inc. v. United States*, 913 F.2d 1521, 1537 (11th Cir. 1990); *In re Marine Transit Corporation*, 94 F.2d 7, 9 (2nd Cir. 1938).

The reason there can be no maritime lien without these elements is that a maritime lien constitutes a property interest in the vessel itself and is based on the legal personification of the vessel as an entity with its own liabilities separate and apart from the liabilities of the vessel owner. *Piedmont*, 254 U.S. at 8-9; *Equilease*, 793 F.2d at 602; *Foss Launch & Tug Co. v. Char Ching Shipping U.S.A. Ltd.*, 808 F.2d 697 (9th Cir. 1987), *cert. denied*, 484 U.S. 828 (1987). This property right allows a supplier to proceed against the vessel itself and to have it arrested and sold to satisfy the vessel's debts and obligations. 46 U.S.C. § 31342(a)(1); Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims. As a result, a vessel can obtain goods and services on its own credit and is a self-reliant commercial entity. *Piedmont*, 254 U.S. at 8-9. In other words, a maritime lien is more than a security device. It is a property interest in the vessel that is based on the principle that the vessel itself is liable. For this reason, maritime liens are stricti juris and will not be extended by construction, analogy, or inference.

Piedmont, 254 U.S. at 11-12. Consequently, to obtain a lien against the vessel, the supplier must have relied on the credit of the vessel and the goods and services must have been provided to the vessel, rather than to the charterer or the owner. *See e.g.*, *Piedmont*, 254 U.S. at 9-10; *Equilease*, 793 F.2d at 603, 605; *Navieros*, 120 F.3d at 323; *Itel Containers Intern. Corp. v. Atlanttrafik Exp. Service Ltd.*, 982 F.2d 765, 768-769 (2nd Cir. 1992). Here, Racal did neither.

B. No Lien Without Reliance on the Credit of the Vessel

Contrary to Racal's contention, reliance on the credit of the vessel as a requirement of a maritime lien both predates and survives the MLA. Before the MLA was enacted in 1910, suppliers could obtain federal maritime liens only on foreign vessels, that is, vessels whose home ports were in another state or country. When supplies were obtained by a vessel in a port other than her home port, it was presumed that the supplier relied on the credit of the vessel since the owner could not be found. *The St. Jago De Cuba*, 22 U.S. (9 Wheat.) 409, 417 (1824); *W.A. Marshall & Co. v. The President Arthur*, 279 U.S. 564, 567 (1929). This presumption, however, was rebuttable, and the vessel could defeat the supplier's lien rights by showing that the supplies were furnished on the owner's personal credit. *The Now Then*, 55 F. 523 (3d Cir. 1893). If the supplies were provided to a vessel in her home port, the law presumed that the supplier relied on the personal credit of the owner who regularly conducted business and could be found in the home port. *The St. Jago De Cuba*, 22 U.S. (9 Wheat.) at 416. In that case, there would be no maritime lien and the supplier would be required to seek relief pursuant to state law which varied from state to state. *See The Roanoke*, 189 U.S. 185, 193-94 (1903).

In 1910, the Maritime Lien Act was enacted to accomplish three goals:

1. To eliminate the difference between home port and foreign port transactions;

2. To eliminate the presumption that a supplier relied on the credit of the owner when the supplies were provided to a vessel in her home port; and

3. To substitute a single federal statute for state statutes conferring liens for vessel repairs, supplies, and other necessaries.

Piedmont, 254 U.S. at 11; *The President Arthur*, 279 U.S. at 567; Fitz-Henry Smith, Jr., *The New Federal Statute Relating to Liens on Vessels*, 24 Harv. L. Rev. 182, 187-188 (1910-1911).

The Act made no change to the general principles of the existing law of maritime liens. *See* S. Rep. No. 690, 61st Congress, 2d Sess. 1 (1910) (The Act makes "no change in the general principles of the law of maritime liens, but merely substitutes a single statute for the conflicting state statutes"). *See also Piedmont*, 254 U.S. at 11-12 and *The President Arthur*, 279 U.S. at 568. Consequently, the rebuttable presumption that the supplier relied on the credit of the vessel remained in place and was applicable regardless of whether the vessel was in her home port or a foreign port. This was explained in *The President Arthur*:

> [T]he Act gave a maritime lien on any vessel, whether foreign or domestic, for necessaries furnished on the order of the owner or his authorized agent, and relieved the libellant from

> the necessity of alleging or proving that credit was given to the vessel. The Committee reports show, however, that it was not intended to make any other change in the general principles of the existing law of maritime liens, and the specific provision that the Act should not be construed as preventing the furnisher of the necessaries from waiving his right to a lien, "by agreement or otherwise," indicates clearly, we think, that it was not intended to change the principles of the maritime law in respect thereto. That an express renunciation of the lien is not essential, is plain.

279 U.S. at 568 (citations omitted).

The 1910 Act, like the current MLA,[9] contained a provision which stated, "it shall not be necessary to allege or prove that credit was given to the vessel." That provision, however, did not eliminate the requirement that the supplier rely on the credit of the vessel. As made plain by this Court in *Piedmont*, *The President Arthur*, and *Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co.*, 310 U.S. 268 (1940), the requirement that the supplier rely on the credit of the vessel survived the enactment of the MLA. In each case, the Court acknowledged that if the supplier did not rely on the credit of the vessel, it had no lien over the vessel. *Piedmont*, 254 U.S. at 9 (a maritime lien can arise only if the pledge of the vessel's credit was necessary); *The President Arthur*, 279 U.S. at 568 (no lien when supplier relies solely on personal security); *Dampskibsselskabet*, 310 U.S. at 276-77 (reliance presumption not rebutted when oil was supplied exclusively for the vessels in question, was delivered directly to the vessels, and was so invoiced).

9. In 1920, the Maritime Lien Act was reenacted and codified at 46 U.S.C. § 971 *et seq*. In 1988, the Act was recodified at 46 U.S.C. § 31341, § 31342, and § 31305. There was no substantive change in any provisions relevant to this case.

Further, all circuit courts addressing the issue agree that a supplier has no maritime lien without reliance on the credit of the vessel. *Navieros*, 120 F.3d at 323 (1st Cir.) (the party attacking the lien has the burden of showing that the party rendering the service relied solely on personal credit); *South Carolina State Ports Authority v. M/V Tyson Lykes*, 67 F.3d 59, 62 (4th Cir. 1995) (while sole reliance on personal security is sufficient to defeat lien, joint reliance on vessel and personal security is not sufficient); *Stevens Technical Services*, 913 F.2d at 1537 (11th Cir.)(the party attacking the lien has the burden of showing that the party rendering the service relied solely on personal credit); *Stevens Technical Services, Inc. v. SS Brooklyn*, 885 F.2d 584, 587 (9th Cir. 1989)(same); *The American Star*, 11 F.2d 479, 482 (3d Cir. 1926)(same); *West Kentucky Coal Co. v. Dillman*, 15 F.2d 25, 27 (8th Cir. 1926)(same); *In re Marine Transit*, 94 F.2d at 9 (2nd Cir.)(no lien arises without reliance on the credit of the vessel).

Commentary also confirms that there is no maritime lien under the MLA without reliance on the credit of the vessel:

> [This provision] does not mean, however, that the lien shall exist *regardless* of the question of credit. Although the reforms in the law are accomplished largely by the first section, the Act must be read as a whole and section 4 provides that nothing in the Act shall be construed to prevent a furnisher from waiving his right to a lien at any time "by agreement or otherwise." The effect of the law, therefore, is to say that when necessaries are furnished a vessel upon the order of one in authority to procure them, they shall be presumed to be on the credit of the vessel.

Fitz-Henry Smith, Jr., *The New Federal Statute Relating to Liens on Vessels*, 24 Harv. L. Rev. 182, 190 (1910-1911).

As a result, lower courts are left to determine only whether the evidence produced by the vessel is sufficient to rebut the presumption by proving that the supplier did not rely on the credit of the vessel. That is what the Fifth Circuit did here. And, given that Racal's president testified that Racal did not rely on the credit of the vessels, the Fifth Circuit correctly concluded there was no maritime lien:

> Pender's testimony clearly indicates that Racal did not rely on the credit of the vessels. Almost nothing is more conclusive than such testimony as to whether there was reliance . . . [B]ecause the testimony explicitly shows that Racal deliberately chose not to rely on the credit of the four chartered vessels, as a matter of law, Racal purposefully intended to forego its maritime lien.

Racal, 231 F.2d at 190; Petitioner's Appendix A, p. 12a.

Racal's argument that there is a conflict among the circuits is without merit. First, in an attempt to show a conflict among the Fifth, First, and Eleventh Circuits, Racal claims that the Fifth Circuit found there was no lien merely because Racal expected to be paid by Coastline. This is simply not true. All circuits, including the Fifth Circuit, hold that expectation of payment from entities other than the vessel is insufficient on its own to defeat a lien under the MLA. In fact, in this case, the Fifth Circuit specifically stated that evidence that Racal expected to be paid by Coastline was not legally sufficient to rebut the presumption of reliance on the vessel's credit. *Racal*, 231 F.3d at 190 n.6, *citing Point Landing Inc. v. Alabama Dry Dock & Shipbuilding Co.*, 261 F.2d 861, 867 (5th Cir. 1958); Petitioner's Appendix A, pp. 11a-12a.

Moreover, contrary to Racal's contention, the Fifth Circuit did not base its decision on Racal's expectation that

it would be paid by Coastline, rather than by TMI or the vessels. Instead, the Fifth Circuit relied on the testimony of Pender that Racal did not rely on the credit of the vessels when providing goods and services to Coastline: "Pender's testimony clearly indicates that Racal did not rely on the credit of the vessels. Almost nothing is more conclusive than such testimony as to whether there was reliance."[10] *Racal*, 231 F.3d at 190; Petitioner's Appendix A, p. 12a. In short, the Fifth Circuit followed the same settled rule of law followed by other circuits, and there is no conflict among the circuits on this issue.

Racal next argues that the Fifth Circuit's treatment of reliance on the credit of the vessel as a prerequisite to a lien conflicts with the First and Eleventh Circuit's treatment of non-reliance on the credit of the vessel as a waiver of the lien. Racal is again wrong. First, as the Fifth Circuit made plain in its opinion in this case and in *Equilease*, a supplier's failure to rely on the vessel's credit is a waiver of the lien. *See Racal*, 231 F.3d at 190; Petitioner's Appendix A, p. 12a (because "Racal deliberately chose not to rely on the credit of the four chartered vessels, as a matter of law, Racal purposefully intended to forego its maritime lien") and *Equilease*, 793 F.2d at 606, 607 n.9 (when the supplier "deliberately chose not to rely on the credit of the vessel, as

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10. Racal's criticism of Pender's testimony as "two bits of deposition testimony" and "the subjective intent of an employee" is further indication that Racal's complaint is merely a factual one. Racal also misinterprets Pender's testimony when it argues that the testimony merely reflects that Pender expected to be paid by Coastline. As the Fifth Circuit found, Pender expressly testified that he did not rely on the credit of the vessels when providing goods to Coastline. Once again, Racal is complaining of alleged erroneous factual findings, which are not a basis for a writ grant under Supreme Court Rule 10.

a matter of law it purposefully intended to forego its right to claim the lien.").[11] In actuality, Racal is complaining about the use of different words that mean the same thing. Other circuits have also noted the overlap between reliance as a rebuttable presumption and a waiver. In *Farrell Ocean Services, Inc. v. United States of America*, 681 F.2d 91 (1st Cir. 1982), the First Circuit explained:

> A party can waive a lien by "agreement or otherwise," but a presumption exists that the service was supplied on the credit of the vessel. The party attacking the lien has the burden of overcoming that presumption by showing that the party rendering the service relied solely on personal credit.

681 F.2d at 93. *See also Navieros*, 120 F.3d at 323; *South Carolina State Ports Authority*, 67 F.3d at 62; *Stevens Technical Services*, 913 F.2d at 1537; *American Star*, 11 F.2d at 481; *In re Marine Transit*, 94 F.2d at 9. In other words, all of the other circuits use the same standard used by the Fifth Circuit, that is, when the vessel proves the supplier did not rely on the credit of the vessel, there is no lien under the MLA:

> [I]n the absence of reliance— intentional, by presumption, or otherwise — there is no right to claim a lien; in different words, if one purposefully foregoes reliance on the credit of the vessel, it is tantamount to purposefully foregoing the right to

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11. Racal is incorrect when it states that the record does not reveal whether Racal knew of the MLA prior to Racal/Coastline agreement. Pender's deposition shows that Racal knew that vessels could be arrested in satisfaction of contractual disputes prior to agreeing to provide goods and services to Coastline and that Pender had been involved in filing an action for a lien in 1992. (Rec. Vol, Depo. of Pender, pp. 108-109).

> claim a lien against the vessel. Thus, when [the supplier] deliberately chose not to rely on the credit of the vessel, as a matter of law it purposefully intended to forego its right to claim the lien.

Equilease, 793 F.2d at 606 n.9.

In sum, the Fifth Circuit correctly applied well-settled principles dating back to the early 19th century to undisputed facts. The court did not disregard the MLA nor did it create a conflict among the circuits. Review by this Court is not warranted.

C. No Lien Unless Goods Are Provided to the Vessel

The requirement that goods be provided to the vessel means just that. One vessel of a fleet cannot be made liable under the statute for supplies furnished to other vessels in the fleet, even if supplied under a single contract. *Piedmont*, 254 U.S. at 10. The lien attaches only when a vessel has been identified at the time the obligation is incurred, that is when the debt arises or at the time of contracting. *Equilease*, 793 F.2d at 602; *Atlanttrafik*, 982 F.2d at 768; *TTT Stevedores of Texas, Inc. v. M/V Jagat Vijeta*, 696 F.2d 1135 (5th Cir. 1983). Consequently, there is no lien when goods or services are provided to the owner or charterer for use at its discretion instead of being provided directly to a specified vessel. *Silver Star Enterprises, Inc. v. M/V Saramacca*, 82 F.3d 666 (5th Cir. 1996). *See also Foss Launch*, 808 F.2d at 703;[12] *Redcliffe Americas Limited v. M/V Tyson Lykes*, 996 F.2d 47

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12. *Foss Launch* uses the term "furnishing". The term "providing" was substituted for "furnishing" when the MLA was amended in 1989. As indicated in the House of Representative report, no substantive change was intended. *See Silver Star*, 82 F.3d at 668 n.2.

(4th Cir. 1993); *Atlanttrafik*, 982 F.2d at 768-769; ***Bankers Trust Co. v. Hudson River Day Line***, 93 F.2d 457, 459 (2nd Cir. 1937); *West Kentucky Coal*, 15 F.2d at 27.

Racal is incorrect when it argues that the Fifth Circuit's holding that Racal failed to provide the goods and services to the vessels is inconsistent with this Court's holdings in *Piedmont*, 254 U.S. 1 (1920) and *Dampskibsselskabet*, 310 U.S. 268. Rather, as recognized in *Dampskibsselskabet*, *Piedmont* created a fact-based standard. *Dampskibsselskabet*, 310 U.S. at 276-77. The Fifth Circuit applied that standard to undisputed facts. Racal's real complaint is that it does not like the result.

Racal seeks to limit the holding of *Piedmont* to instances where the supplies can be used both on vessels and on land. This interpretation ignores 99% of the opinion, and certainly misses the rule of law.[13] The focus of *Piedmont* was the much broader issue of the relationships among: (1) a supplier of coal, (2) a vessel owner who could disburse and use the coal as it saw fit, and (3) vessels which ultimately received some of the coal. Because some of the supplies were ultimately used on the vessels, the Court defined the determinative question as "Was the coal furnished by the libelant, the Coal Company, or was it furnished by the Oil Corporation, the owner of the fleet?" *Piedmont*, 254 U.S. at 6.

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13. Racal is factually incorrect when it states in its petition that none of the equipment or services could be used or performed on land. Racal personnel testified that the GPS and the differential systems were not particularly maritime because they are used for "everything from driving your car to a farmer farming his field." (Rec. Vol. 9, p. 1357, exhibit H, p. 192). Racal is also incorrect when it says the primary role of the equipment was to aid the vessels because the equipment was essential to Coastline's operations as a seismic survey company, and not to the operation of TMI's vessels. (R.E. 9, pp. 39, 41-42, 75, 84, 98, 108-109; R.E. 10, pp. 14-17).

To answer that question, the Court conducted a factual inquiry and examined whether the supplier dealt directly with the officers of the vessel, whether the owner was billed, whether the vessels were specifically referenced and identified on the invoices, and whether the parties to the agreement understood that the supplies would be provided to specifically identified vessels. *Piedmont*, 254 U.S. at 6-7. The Court found it significant that under the agreement the owner, rather than the supplier, could distribute the coal to the vessels in its discretion as the purchaser of the coal. *Piedmont*, 254 U.S. at 7, 13. Based on these facts, the Court concluded that the owner, not the supplier, furnished the coal to the vessels. *Id.* at 13. Consequently, the supplier had no lien. *Id.*

The same relationships are present here. Racal provided goods and services to Coastline for use at Coastline's discretion. (R.E. 8, pp. 45-47). Coastline was free to charter any vessel from any company and could use the Racal goods and services as it saw fit aboard whatever vessels Coastline chartered. (Rec. Vol. 9, p. 1357, exhibit E, pp. 35-36, exhibit H, p. 44; R.E. 8, pp. 45-47). Like the supplier in *Piedmont*, Racal provided its goods and services to Coastline, not to the vessels. The Fifth Circuit's conclusion that Racal did not provide goods and services to the vessels is parallel to rather than inconsistent with *Piedmont*.

Racal also argues that the Fifth Circuit's decision is in conflict with *Dampskibsselskabet*, 310 U.S. 268. *Dampskibsselskabet*, however, did not address the "provided to" requirement of the MLA that is at issue here. Instead, *Dampskibsselskabet* examined whether the supplier's contract provided that "the oil should be supplied on the sole credit of Comyn as the owner or charterer of the vessels. . . ." *Id.* at 276. In fact, the Court distinguished *Dampskibsselskabet* from *Piedmont* because *Piedmont* spoke to the "provided to" requirement, not the reliance issue. *Id.* at 276-77.

In any event, *Dampskibsselskabet* is distinguishable on its facts from both *Piedmont* and this case. In *Dampskibsselskabet*, the supplies were furnished exclusively for the vessels in question and were invoiced accordingly. *Id.* at 277. The same is not true here. When comparing this case to *Dampskibsselskabet*, the Fifth Circuit evaluated whether Racal furnished its goods and services exclusively to the TMI vessels. *Racal*, 231 F.3d at 192; Petitioner's Appendix A, pp. 15a-16a. The transfer of the goods and services between vessels established that the goods and services were not provided exclusively to the TMI vessels. *Id.* Racal's argument that the Fifth Circuit's consideration of the transfer of goods and services from vessel to vessel is without precedent ignores the legal issues, and is no more than a disagreement with the Fifth Circuit's application of law to fact. *See e.g., Bellingham National Bank v. Oil Screw Pacific Horizon*, 587 F.Supp. 26, 28-29 (W.D. Wash. 1984)(the court held the supplier did not have a lien over the second vessel for the price of the net, where the owner of several vessels purchased a net for one vessel and later moved it to a second vessel, because the net was not provided to the second vessel within the meaning of the MLA).

Finally, the Fifth Circuit's decision is consistent with the other circuit courts who have addressed the issue, including the Second, Fourth, Eighth, and Ninth Circuits. In fact, in *Silver Star*, the Fifth Circuit explicitly stated that it was following the rule of law of its sister circuits by denying a maritime lien when goods were not provided to a specific vessel. *Silver Star,* 82 F.3d at 669-670. *See Redcliffe*, 996 F.2d at 51-52; *Atlanttrafik*, 982 F.2d at 769; *Foss Launch*, 808 F.2d at 698, 703. In each of these cases, suppliers of cargo containers provided containers to vessel owners or charterers who distributed the containers among their fleets as they saw fit. The courts concluded that the suppliers did not provide the containers to the vessels and therefore did

not have maritime liens. *Redcliffe*, 996 F.2d at 51-52; *Atlanttrafik*, 982 F.2d at 766, 769; *Foss Launch*, 808 F.2d at 698, 703. *See also Bankers Trust*, 93 F.2d at 459 (no maritime lien for coal provided to buyer for use at buyer's discretion because it was not provided to the vessel) and *West Kentucky Coal*, 15 F.2d at 27 (no maritime lien for oil provided to buyer for use at buyer's discretion).

CONCLUSION

There is neither an error of law nor a conflict in the circuits as suggested by petitioner. Indeed, there are no Rule 10 grounds for the grant of Racal's petition for a writ of certiorari in this fact-specific case. After reviewing the deposition testimony and affidavits of Racal's president, officers, and customers, the Fifth Circuit correctly applied well-settled law to undisputed facts to hold that Racal has no maritime lien against TMI's vessels because Racal did not rely on the credit of the TMI vessels when providing goods and services to Coastline, and Racal did not provide goods and services to the vessels within the meaning of the MLA. Racal's petition for a writ of certiorari should be denied.

Respectfully submitted,

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